

Chapter ER 28

WORKER'S COMPENSATION AND HAZARDOUS DUTY INJURY PAY

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Note: Chapter Pers 28 was renumbered Chapter ER–Pers 28, effective March 1, 1983; Corrections made under s. 13.93 (2m) (b) 6., Stats., [Register December 2003 No. 576](#).

ER 28.01 Statutory authority. Subject to the provisions of ch. 102, Stats., an employee suffering an injury while performing service growing out of and incidental to his or her employment, is entitled to worker's compensation. Certain employees injured while performing hazardous duties and who are unable to work may continue to receive their full pay, as provided under s. 230.36, Stats., while unable to work as a result of the injury or until termination of their employment.

History: Cr. [Register, October, 1972, No. 202](#), eff. 11–1–72; am. [Register, December, 1976, No. 252](#), eff. 1–1–77; am., [Register, February, 1981, No. 302](#), eff. 3–1–81; renun. from ER–Pers 28.01, [Register, May, 1988, No. 389](#), eff. 6–1–88.

ER 28.015 Definition of employee. For purposes of hazardous duty injury pay under s. 230.36, Stats., “employee” has the meaning set forth in s. ER 1.02 (10), but excludes any limited term employee under s. 230.26, Stats.

History: Cr. [Register, May, 1988, No. 389](#), eff. 6–1–88; correction made under s. 13.93 (2m) (b) 7., Stats., [Register, October, 1994, No. 466](#).

ER 28.02 Effect of worker's compensation. (1) During the period an employee is absent from work due to injury from state employment and is awaiting a determination under ch. 102, Stats., the employee personally or through his or her representative may elect to:

(a) Use accrued paid leave credits, e.g., sick leave, vacation, holiday, compensatory time, to cover the absence from work and consequent loss of earnings, or

(b) Request leave without pay and await payment of worker's compensation.

(2) The employee shall give written notification to the employing agency of the elected manner of coverage for such absence before the end of the pay period in which the absence occurs. If the employee fails to specify how the absence should be covered, the absence shall be charged against the available leave options as determined by the agency, which may be later amended upon the employee's request.

(3) In instances where accrued leave with pay credits have been used to cover an absence which is later found compensable, the appointing authority shall, if requested by the employee, provide leave without pay on a day for day basis, with such leave to be taken in accordance with s. ER 18.14 (2) (a).

(4) If the employee elects to await worker's compensation and the claim is later found non–compensable, accrued leave with pay credits may be used for the absence.

(5) An employee may elect to use accrued paid leave credits to supplement worker's compensation benefits under ch. 102, Stats., to the extent that the employee shall receive the equivalent of the employee's base pay as defined under s. ER 1.02 (5). Notice of such election by the employee shall be reported in the same manner provided for in sub. (2).

History: Cr. [Register, October, 1972, No. 202](#), eff. 11–1–72; am. (1) (b), (4) and (5), [Register, December, 1976, No. 252](#), eff. 1–1–77; am. (1) (intro.) and (a), (2), (3) and (5), [Register, February, 1981, No. 302](#), eff. 3–1–81; renun. from ER–Pers 28.02 and am. (2) and (5); correction in (3) made under s. 13.93 (2m) (b) 7., Stats., [Register, October, 1994, No. 466](#).

ER 28.03 Concurrent benefits. An employee may be entitled to concurrent benefits, i.e. worker's compensation for medical treatment expenses and benefits for time lost from work provided under s. 230.36, Stats., in which case the appropriate provisions of this chapter apply. Under no circumstances shall an employee receive more than his or her basic rate of pay for the job in which the employee was performing at the time of injury, exclusive of reimbursable medical expenses.

History: Cr. [Register, October, 1972, No. 202](#), eff. 11–1–72; am. [Register, December, 1976, No. 252](#), eff. 1–1–77; am. [Register, February, 1981, No. 302](#), eff. 3–1–81; renun. from ER–Pers 28.03 and am. [Register, May, 1988, No. 389](#), eff. 6–1–88.

ER 28.04 Injury while on hazardous duty.

(1) Application for benefits under s. 230.36, Stats., shall be made by the employee or the employee's representative to the appointing authority within 14 calendar days from the day of injury, on forms prescribed by the director. In extenuating circumstances, at the discretion of the director, the time limit for application for benefits may be waived. When medical verification is required for final approval of the claim, failure by a physician to provide verification within the 14 days shall not be the basis for denial. The application shall contain sufficient and factual information to indicate the nature and extent of the injury or illness, the circumstances surrounding its occurrence and the qualifying duties on which the application is based.

(2) Within 14 days after receipt of the claim the appointing authority shall notify the employee of the decision to authorize or deny the claim and file a copy of the notice of action with the director.

(3) Upon approval of the employee's claim, the employee shall be paid from the date of inability to work until: a physician certifies the employee is able to return to work; the employee's status is changed due to worker's compensation, disability, retirement, or new work assignments; the employee is terminated; or other appropriate status change occurs. Periodic reports on the status of the employee's disability and anticipated date of return to work shall be required by the appointing authority.

(4) An employee on leave with pay under this section shall be entitled to applicable pay adjustments applied to the pay schedule and range the employee's class is assigned to, consideration for within range pay progression if eligible and personal holidays. However, personal holidays shall lapse if the employee does not return to full work status by the end of the calendar year.

(5) Employees on approved leave with pay under this section shall earn annual leave and sick leave credits for the duration of such leave. Employees shall be denied legal holiday credits for holidays which occur during the period of absence from work while on an approved leave with pay under this section. Annual leave credits earned prior to the date of injury may be carried over pursuant to s. ER 18.02 (6).

(6) An employee may elect to use accrued paid leave credits to supplement payments under s. 230.36, Stats., to the extent that the employee shall receive the equivalent of the employee's base pay as defined under s. ER 1.02 (6). Notice of such election by the employee shall be reported as provided in sub. (2).

History: Cr. [Register, October, 1972, No. 202](#), eff. 11–1–72; am. (4), [Register, September, 1975, No. 237](#), eff. 10–1–75; am. (4), [Register, December, 1976, No. 252](#).

eff. 1-1-77; am. (1) to (4) and r. and recr. (5), [Register, February, 1981, No. 302](#), eff. 3-1-81; renum. from ER-Pers 28.04 and am. (1) to (3) and (5), cr. (6), [Register, May, 1988, No. 389](#), eff. 6-1-88.

ER 28.05 Medical examinations. (1) Employees on leave with pay shall submit to such physical or medical examinations as may be required by the appointing authority to determine the extent of or continuation of disability and inability to work. Such examinations shall be at the expense of the agency and performed by physicians selected by the agency. A complete report indicating the nature and extent of disability and prognosis for a reasonable return to duty and date of such return shall be submitted to the agency.

(2) Refusal by the employee to submit to examinations ordered by the appointing authority or medical treatment ordered by the examining physician shall constitute grounds for disciplinary action.

(3) Based upon the information provided by the medical reports the appointing authority shall determine the extent to which leave with pay shall be granted or take action to terminate employment.

(4) Upon return to full work status, an employee's benefits under this section shall cease, providing the employee's attending physician has released the employee from further medical treatment. In the event that the employee is able to return to full work status but further medical treatment is required for the sustained injury, benefits shall continue to be granted to cover the treatment

time providing the attending physician has made a prior determination that such treatment is necessary for full recovery.

(5) When an employee suffers further aggravation of an injury for which benefits have ended, the employee may, upon recommendation of the attending physician, have such benefit resume for the period of treatment recommended, provided such aggravation meets the qualifying provisions of s. 230.36, Stats.

History: Cr. [Register, October, 1972, No. 202](#), eff. 11-1-72; am. (1), (4) and (5), [Register, February, 1981, No. 302](#), eff. 3-1-81; renum. from ER-Pers 28.05, [Register, May, 1988, No. 389](#), eff. 6-1-88.

ER 28.06 Appeal rights. If an employee's claim for leave with pay due to hazardous duty injury is denied by the appointing authority, the employee may appeal the action to the commission by filing a written request within 30 calendar days after being notified of such decision or within 30 calendar days from the effective date of the decision, whichever is later. Failure to file the appeal within the specified time limit shall bar the employee from any future claims to s. 230.36, Stats., benefits related to the particular injury incurred.

History: Cr. [Register, October, 1972, No. 202](#), eff. 11-1-72; am., [Register, February, 1981, No. 302](#), eff. 3-1-81; renum. from ER-Pers 28.06, [Register, May, 1988, No. 389](#), eff. 6-1-88.

ER 28.07 Subrogation rights. See s. 230.36 (5), Stats.

History: Cr. [Register, December, 1976, No. 252](#), eff. 1-1-77; am., [Register, February, 1981, No. 302](#), eff. 3-1-81; renum. from ER-Pers 28.07, [Register, May, 1988, No. 389](#), eff. 6-1-88.